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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 953

AARON FRANZBLAU and RUTH SCHLEIN,

Petitioners,

vs.

MAMIE SOLES, Administratrix *ad prosequendum* for the estate of DONNIE SOLES, deceased, and WILLIE ASKINS, Administrator *ad prosequendum* for the estates of DOROTHY ASKINS SOLES, deceased, and ALFREDA ASKINS, deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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No.

AARON FRANZBLAU and RUTH SCHLEIN,

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vs.

MAMIE SOLES, Administratrix *ad prosequendum* for the estate of DONNIE SOLES, deceased, and WILLIE ASKINS, Administrator *ad prosequendum* for the estates of DOROTHY ASKINS SOLES, deceased, and ALFREDA ASKINS, deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on November 2, 1965.

Citations to Opinions Below

The opinion of the District Court is unreported and is printed in Appendix A hereto, p. 18a. The opinion of the Court of Appeals, printed in Appendix C hereto, p. 3a, is reported in 352 F. 2d 47 (3rd Cir. 1965).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on November 2, 1965. Appendix D, p. 9a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Is the Court of Appeals empowered to set aside findings of fact of a trial court where those findings have not been found to be "clearly erroneous"?

2. Can the Court of Appeals make an independent finding of fact contrary to that of the trial court and direct the entry of judgment thereupon?

3. Was the finding of fact by the trial court of the absence of proximate cause a fair inference from the evidence?

4. Did the Court of Appeals commit error in concluding that proximate cause existed as a matter of law?

5. Did the Court of Appeals improperly shift the burden of proving the absence of proximate cause to the defendant?

6. Was the interpretation of N.J.S.A. 55:3-4 proper and in accordance with New Jersey law?

Statutes and Rules Involved

The statutory provision involved is N.J.S.A. 55:3-4, which provides:

> "Every nonfireproof tenement house erected prior to March twenty-fifth, one thousand nine hundred and four, which is three stories or more in height shall, except as otherwise provided in this section and section 55:3-3 of Title, have a fire escape directly accessible to each apartment. The provisions of this subtitle relating to outside fire escapes shall not apply to any house not more than three stories in height, which shall be provided with two independent stairways not adjacent to each other, leading from the top floor of said house to the first floor thereof, to both of which stairways all of the persons occupying the top floor shall have access without entering any apartment other than the one occupied by such tenants."

The Rule involved is Rule 52(a) of the Federal Rules of Civil Procedure 28 U.S.C.A. which provides in part:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Statement of the Case

A lawsuit was instituted in the Federal District Court of New Jersey by Mamie Soles, Administratrix *ad prosequendum* for the Estate of Donnie Soles, deceased and Willie Askins, Administrator *ad prosequendum* for the Estates of Dorothy Askins Soles, deceased and Alfreda Askins, deceased. The jurisdiction of the District Court was invoked because of diversity of citizenship—the Administrators being residents of the State of North Carolina and South Carolina respectively and the defendants citizens of the State of New Jersey.

Plaintiffs' claims arise out of deaths resulting from a fire of unknown origin. There was no proof of the cause of the fire nor any semblance of proof of negligence on the part of the defendants connected with its origin.

The kernel and theory of plaintiffs' case was ultimately limited to negligence arising from the alleged violation of a particular section of the Tenement House Act of the State of New Jersey, N.J.S.A. 55:3-4. All other alleged grounds of negligence were abandoned and were not urged on appeal to the Court of Appeals.

The trial court, sitting without a jury, and reviewing all the evidence submitted through live witnesses, made a finding that the defendants violated a provision of the Tenement Housing Act; and made a further finding that the plaintiffs failed to sustain the burden of proving the element of proximate cause between the violation and the deaths. Accordingly, judgment was entered for the defendants.

The fire occurred on June 8, 1961 in a three story frame dwelling erected in the 1890's. Those who escaped the fire did so through the windows of the apartments, including one occupant of the apartment in which the decedents died.

A policeman who was on duty in the neighborhood testified that when he passed the building there had been no fire and upon his return within approximately five minutes the blaze had already spread through the building, and people were jumping from the windows. There was additional testimony indicating that the fire had produced extensive smoke.

The trial court found "that the decedents were overcome with smoke and passed out in the bedroom of their apartment." (Appendix A. p. 20a). Respondents do not disagree with the basis of this finding. Indeed, in their brief to the Court of Appeals they stated:

> "Twenty-five year old Donnie Soles was burned to death in his apartment, while twenty-seven year old Dorothy Soles and Alfreda Askins, age 7, were subsequently taken out of the burned apartment and died the same day in the hospital."

Moreover, the Court of Appeals did not disagree. It found that "Donnie Soles was asphyxiated and died in the apartment; the others died soon after they were removed to the hospital." (Appendix C, p. 4a).

The Court of Appeals, however, reversed. It found that there was nothing in the record to support the fact finder's determination that "the other members of the Soles family (decedents) were unable to reach the window prior to being overcome with the fumes and smoke inhalation" and "that it would have been impossible for them (decedents) to have left the house by utilization of any stairway whether or not the same was independent in the sense set out in the * * * statute." (Appendix C, p. 7a).

The court, admitting that there was no evidence in the record as to when, in relation to the start of the fire, the decedents succumbed, found that "there was ample evi-

dence in the record from which the court could have, and should have, inferred that the deaths were proximately caused by the violation of the Statute." It further observed that the evidence "will admit of no other inference." (Appendix C, pp. 7a-8a). In effect the court found that deaths or injuries in a fire of unknown origin must result in a judgment as a matter of law upon mere proof of a violation of the Tenement House Statute.

Reasons for Granting the Writ

1. The opinion and judgment of the Court of Appeals is contrary to existing rules and Supreme Court opinions on the subject.

In reversing the judgment of the District Court, the Court of Appeals held that ultimate findings of fact where predicated upon inferences drawn from evidence as to which there was no disagreement are reviewable on appeal free from the impact of Rule 52(a) of the Rules of Civil Procedure. The Court of Appeals thereby exceeded the narrowly circumscribed limitations on scope of review imposed by the nature of the appellate process as embodied in the rules.

Appellate review is generally limited in scope. Where a jury has tried the matter on correct instructions, the only inquiry is whether it cannot be said that reasonable men could reach differing conclusions on the issue. *Commissioner* v. *Duberstein*, 363 U. S. 278, 4 L. Ed. 2d 1218, 80 S. Ct. 1190 (1960). Where, as here, the matter has been tried without a jury pursuant to Rule 38 of the Rules of Civil Procedure 28 U. S. C. A., the inquiry is twofold (1) has the court applied the correct legal principles to the facts as found, and (2) are those findings of fact not "clear-

ly erroneous''? Fed. R. Civ. P. 52(a). *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 92 L. Ed. 746, 68 S. Ct. 525 (1948).

Thus, the verdict of a jury is conclusive, absent a showing that there is insufficient evidence to sustain it; whereas the findings of trial court are conclusive where the reviewing court cannot say on the entire evidence that it is left with the definite and firm conviction that a mistake has been committed. *United States* v. *United States Gypsum Co., supra* at p. 394. Although judicial review of findings of trial courts does not have the constitutional dimensions of review of jury findings, nevertheless, they are subject to similar limitations of appellate judicial restraint.

The court's opinion that Rule 52(a) may be ignored is contrary to the rules and the decisions of the Supreme Court. The mandate of Rule 52(a) that "findings of fact shall not be set aside unless clearly erroneous" was intended to apply to all findings of fact whether adduced from a conflict of testimony or from deductions or inferences from uncontradicted testimony. Notes of Advisory Committee on Rules, Rule 52(a); 5 *Moore, Fed. Practice,* par. 52.01 [4], p. 2604 (2nd ed. 1964).

The Supreme Court's position was first made clear in *United States* v. *United States Gypsum Co., supra.* There should have been little doubt thereafter that "inferences drawn from documents or undisputed facts" are truly findings of fact and require the application of Rule 52(a) of the Rules of Civil Procedure. *Commissioner* v. *Duberstein, supra,* and *U. S.* v. *Singer Mfg. Co.*, 374 U. S. 174, 10 L. Ed. 2d 823, 83 S. Ct. 1773 (1963) have reaffirmed the Supreme Court's opinion. Nevertheless, the Court of Appeals did not here abide by the precedents and guidelines established by the Supreme Court.

2. The conflict between Circuits requires final clarification by the Supreme Court.

The Third Circuit has been joined by other Circuits in abandoning the clearly erroneous rule where they characterize as "undisputed" the facts underlying the ultimate findings of fact below. See *e.g., Miller* v. *C.I.R.*, 327 F. 2d 846 (2d Cir.), *cert. den.* 379 U. S. 816, 85 S. Ct. 32 (1964); *United Nations Korean R.A.* v. *Glass Production Methods*, 291 F. 2d 168 (2d Cir. 1961); *Merchants National Bank & Trust Co.* v. *U. S.*, 246 F. 2d 410 (7th Cir.), *cert. den.* 355 U. S. 881, 2 L. Ed. 2d 112, 78 S. Ct. 148 (1957) *reh. den.* 355 U. S. 920, 2 L. Ed. 2d 280, 78 S. Ct. 339 (1958); *Mayo* v. *Pioneer Bank & Trust Co.*, 297 F. 2d 392 (5th Cir. 1961).

Other Circuits have maintained that by virtue of the appellate process an appellate tribunal is not privileged to try the case *de novo*. See *e.g., Stauffer Laboratories, Inc.* v. *F.T.C.*, 343 F. 2d 75 (9th Cir. 1965); *Lundgren* v. *Freeman*, 307 F. 2d 104 (9th Cir. 1962); *Mid-Continent Casualty Company* v. *Everett*, 340 F. 2d 65 (10th Cir. 1965); *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d 358 (10th Cir. 1958); *Snorgrass* v. *Sears, Roebuck & Co.*, 275 F. 2d 691 (7th Cir. 1960); *Cole* v. *Neaf*, 334 F. 2d 326 (8th Cir. 1964); *Pendergrass* v. *N. Y. Life Ins. Co.*, 181 F. 2d 136 (8th Cir. 1950); *U. S.* v. *Allinger*, 275 F. 2d 421 (6th Cir. 1960); *Summers* v. *Watkins Motor Lines*, 323 F. 2d 120 (4th Cir. 1963); *Texas Co.* v. *R. O'Brien & Co.*, 242 F. 2d 526 (1st Cir. 1957); *Bishop* v. *U. S.*, 223 F. 2d 582 (D. C. Cir. 1955), *rev'd on other grounds* 350 U. S. 961, 100 L. Ed. 835, 76 S. Ct. 440 (1956).

The existence of any doubt as to whether the trial court or the Court of Appeals is the ultimate trier of the fact-issues in non-jury cases is detrimental to the orderly ad-

ministration of justice, impairs the confidence of litigants and the public in the decisions of the District Courts, and multiplies the number of appeals in such cases.

It is respectfully submitted that the Supreme Court should erase any doubt which might exist by directing the Courts of Appeals to refrain from exercising those functions conferred by law upon the trial court.

3. The entry of judgment by the Court of Appeals is contrary to its appellate power and in conflict with decisions of other courts.

Not only did the Court of Appeals set aside the trial court's findings contrary to the Supreme Court decisions, but it exceeded its appellate function by entering judgment in favor of plaintiffs. This result appears unsupportable and contrary to the accepted standards of the limited power and function of an appellate court in the Federal system. Indeed the court made no attempt to do so. Of the two possible rationales which might underly the court's decision, neither appears sustainable as a legal principle.

The first is somewhat enmeshed with the court's theory regarding scope of review. For apparently built upon that misapplication of the law is a further and equally dangerous doctrine of law; namely, that if the Court of Appeals is not constrained to follow the clearly erroneous rule and can therefore set aside the findings of the trial court on its own *de novo* review of the facts, it can further supplant those findings with its own, and upon those new findings enter judgment.

It is submitted that the issue of whether a Court of Appeals can enter judgment must be viewed in light of a Court of Appeals' powers after it has determined findings of the trial court to have been clearly erroneous. *Texas Co.* v. *R. O'Brien & Co.*, 242 F. 2d 526 (1st Cir. 1957).

Rule 52(A) provides that a trial court's findings of fact may be "set aside." Similarly, a jury's verdict may be "set aside" if not sustained by the evidence. As discussed *supra* under Point I, the appellate function does not differ between a jury case and a non-jury case. There exists merely a minor difference in scope between the standards of review in both cases. There is little doubt that judgment cannot be entered in favor of the plaintiff upon a finding by the Court of Appeals that the jury's verdict was not sustained by the evidence. Similarly, nowhere is the Court of Appeals empowered to substitute as the basis of a new judgment its findings where the case has been tried below without a jury. "(T)he Appellate Court would assume thereby a power of making findings of fact, which passed out of the Federal system with the abolition of trials *de novo*. The Appellate Courts of the Federal System have such power neither inherently nor by grant, express or implied." *Randall Foundation* v. *Riddell*, 244 F. 2d 803 (9th Cir. 1957).

There is authority for the proposition that a Court of Appeals can direct the entry of judgment (1) in an equity case, (2) in a jury-waived case upon an agreed statement of facts, (3) in a jury-waived case in which the trial court's findings of fact are sustained by the evidence and are complete, but its conclusions of law and judgment are erroneous. *Paull* v. *Archer-Daniels-Midland Company*, 313 F. 2d 612 (8th Cir. 1963); *Thornton* v. *Carter*, 109 F. 2d 316 (8th Cir. 1940).

It is significant that the case at bar does not fall within any of the foregoing permissible categories. The said categories differ markedly from that in which findings of fact by the trial court are based upon inferences drawn from the testimony of live witnesses. Where, as in the case at bar, new findings of fact may ultimately be made from the existing or new evidence, the case must be likened to that

of a jury verdict which has been set aside and must be remanded for a new trial.

In direct conflict with the court's course of action herein is the case of *Northern Pac. Ry. Co.* v. *Van Dusen Harrington Co.*, 34 F. 2d 787 (D. C. Minn. 1929). There Judge Sanborn pointed out:

> ". . . when a party to such a (jury-waived) action has secured a finding of fact in his favor, the Circuit Court of Appeals cannot, upon a reversal of the case for the reason that the finding of fact was not justified by the evidence, direct the entry of judgment, but can only order a new trial". *Id.* at p. 787

Another possible rationale for the court's action is that it entered judgment as a matter of law upon the facts found below. The procedural justification for this action is subject to question in any event since respondent did not move for a judgment at the trial court level and therefore should be entitled to a new trial only. See Rule 50(b); *Johnson* v. *New York, N.H. & H.R. Co.*, 344 U. S. 481, 97 L. Ed. 77, 73 S. Ct. 125 (1952).

More significantly, the effect of this proposition within the framework of the facts at bar would result in the following unusual principle of law:

> Recovery must be granted as a matter of law to any person dying in a fire where the building in which that person died was not equipped with the proper stairways pursuant to statute, unless the defendant sustains the burden of proving the absence of proximate cause.

The opinion of the Court of Appeals reflects an approach by which the commonly accepted allocation of the burden of proof in a civil case is shifted from the plaintiff to the

defendant. The court reaches its conclusion that there is proximate cause as a matter of law because of the absence of evidence negating it and not because of the existence of evidence supporting it. It was that very absence of evidence which impelled the trial court—the trier of facts—to draw the permissible inference that the plaintiff had failed to sustain the burden of proving proximate cause.

The Court of Appeals, on the other hand, held that such an inference was not part of the fact finding process, and that it had the power to determine proximate cause as a matter of law. In the process it, in effect, assumed that the defendant had the burden of disproving proximate cause. It is submitted that from the evidence and the inferences the fact finder could have concluded that there was or was not proximate cause between the alleged negligence and the deaths. Under such circumstances, the Court of Appeals exceeded its power and function in concluding that proximate cause existed as a matter of law.

4. The interpretation of the New Jersey Statute is clearly erroneous.

It is respectfully submitted that the trial court and the Court of Appeals were in error in finding that the stairways in the premises were constructed in violation of the applicable statute and that said violation constituted negligence.

The pertinent Statute is N.J.S.A. 55:3-4, which applies to the defendants' building which was constructed prior to 1904.

Under the statute, since the building in question was not more than three stories in height, fire escapes were not a requisite, if there were provided "* * * two independent stairways not adjacent to each other, leading from the top floor of said house to the first floor thereof, to both of which

stairways all of the persons occupying the top floor shall have access without entering any apartment other than the one occupied by such tenants * * *"

It is clear that there was one stairway leading to an exit in front of the building on 12th Avenue; and there was another stairway leading to an exit at the rear of the building. Both of these stairways are separate and apart and do not merge with each other at any point. As required by the Statute, they lead from the top floor to the first floor and are not adjacent to each other. In fact, they are located at the front and rear and are therefore as remote as possible from each other. In addition, access to each stairway is provided by a common hallway and not through entrance from any apartment.

The trial court and the Court of Appeals held that there must be independent access from each apartment to each stairway in order to comply with the Statute. It is difficult to comprehend how any type of construction could afford access to each stairway to all tenants without some type of common hallway for that purpose. This is particularly so within the framework of the pertinent statute which prohibits access to such stairway through any other apartment. It is submitted that a proper interpretation of the meaning of this statutory provision, as applied to the undisputed facts in the record, leads to the conclusion, as a matter of law, that there was full compliance.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SAMUEL A. LARNER,
Counsel for Petitioners.

APPENDIX A

This appendix is the one filed by the Respondents herein (Appellants below) in the United States Court of Appeals for the Third Circuit and is made part of the certified record sent to this Court by the Clerk of the Third Circuit.

APPENDIX B

This appendix is the one filed by the Petitioners herein (Respondents below) in the United States Court of Appeals for the Third Circuit and is made part of the certified record sent to this Court by the Clerk of the Third Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15024

MAMIE SOLES, ADMINISTRATRIX AD PROSEQUENDUM FOR THE ESTATE OF DONNIE SOLES, DECEASED, AND WILLIE ASKINS, ADMINISTRATOR AD PROSEQUENDUM FOR THE ESTATES OF DOROTHY ASKINS SOLES, DECEASED, AND ALFREDA ASKINS, DECEASED,

Appellants,

v.

AARON FRANZBLAU AND RUTH SCHLEIN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued March 16, 1965

Before McLAUGHLIN, HASTIE and SMITH, *Circuit Judges.*

OPINION OF THE COURT

(Filed—November 2, 1965.)

By SMITH, *Circuit Judge.*

This action, under the Wrongful Death Act of New Jersey, N.J.S.A. 2A:31-1 and 31-2, was brought by the

plaintiff Mamie Soles on behalf of the next of kin of Donnie Soles, and by the plaintiff Willie Askins on behalf of the next of kin of Dorothy Askins Soles and Alfreda Askins. The action was tried by the court without a jury and resulted in a judgment in favor of the defendants from which the plaintiffs appeal.

The defendants were the owners of a three-story tenement house located on the corner of Hunterdon and Twelfth Streets in the City of Newark. The building was of frame construction and had been erected prior to March 25, 1904. There was a store and an apartment on the first floor and there were two apartments, front and rear, on each of the other floors. The only means of ingress and egress to the apartments on the second and third floors were common hallways, extending from the front to the rear of the building, at the ends of which there were stairways leading from the ground floor. The tenement was admittedly not furnished with fire escapes.

The plaintiffs' decedents, who had occupied the rear apartment on the third floor, suffered fatal injuries in a fire which partially destroyed the interior of the tenement, particularly the hallways and stairways, early in the morning hours of June 8, 1961. The exterior of the building was damaged only slightly. Donnie Soles was asphyxiated and died in the apartment; the others died soon after they were removed to a hospital.

The fire started in the hallway of the ground floor, from which it spread to the second and third floors, making access from the apartments to the hallways impossible. After the alarm was sounded the first person to arrive on the scene was a policeman who had passed by five minutes

earlier but saw no evidence of fire. As he approached the building flames "were coming out of the front hall door and the first floor establishment." The fire was so intense that entrance into the building was prevented.

While on the scene, and before the firemen arrived, the policeman observed several occupants of the first and second floors leaping from their apartment windows to the ground. When the firemen arrived, several minutes later, they placed a ladder against the side of the building; the uprights were rested immediately beneath a window of the decedents' apartment. The policeman ascended the ladder and as he did so a six year old boy, one Alfred Askins, "jumped" from the window; the boy's fall was broken when the policeman attempted to "catch" him. As the policeman descended the ladder, a woman, whose identity was not ascertained, either fell or leaped from a window of an apartment on the second floor.

The plaintiffs predicated the charge of negligence upon an alleged violation of N.J.S.A. 55:3-4, which reads in pertinent part as follows:

> "Every nonfireproof tenement house erected prior to March twenty-fifth, One Thousand Nine Hundred and Four, which is three stories or more in height shall, * * *, HAVE A FIRE ESCAPE DIRECTLY ACCESSIBLE TO EACH APARTMENT. The provisions of this subtitle relating to OUTSIDE FIRE ESCAPES shall not apply to any house not more than three stories in height, which shall be provided with two INDEPENDENT STAIRWAYS not adjacent to each other." (Emphasis supplied.

Appendix C

It is obvious that this statute was intended for the protection of tenants and other occupants of certain tenements. Under the law of New Jersey the breach of such a statute, although not negligence *per se*, is evidence of negligence. *Fortugno Realty Co.* v. *Schiavone-Bonomo Corp.*, 189 A. 2d 7, 12 (1963); *Mattero* v. *Silverman*, 176 A. 2d 270, 275 (1961); *Lambe* v. *Reardon*, 173 A. 2d 520, 526 (1961); *Moore's Trucking Co.* v. *Gulf Tire & Supply Co.*, 87 A. 2d 441, 443 (1952).

The defendants do not dispute the applicability of the statute. They argue, notwithstanding the finding of the court below to the contrary, that the stairways at each end of the hallways met the requirements of the enactment. We cannot agree. These stairways, although not adjacent, were not independent within the meaning of the statute.

We are of the opinion that the stairways may be regarded as "independent" within the meaning of the statute[1] only if they are so disposed with relation to the apartments as to afford the occupants alternate means of escape in the event of fire. The stairways with which the defendants' tenement was furnished did not meet this requirement. They were accessible to each apartment only through the common hallways by which they were connected; if access to the hallways was prevented by fire, as it was in this case, the stairways afforded no means of escape. Under these circumstances it was the duty of the defendants to provide the tenement with outside fire escapes as required by the statute. This they failed to do.

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[1] We have found no case construing the term "independent stairways," and the parties have cited none.

Appendix C

The trial judge correctly found that (1) "the stairway system in use at [defendants'] premises" did not meet the statutory requirements, and (2) "the fire was of such fierceness and magnitude that it was impossible for anyone to escape through the INTERIOR of the house." He further found "the other members of the Soles family [decedents] were unable to reach the window prior to being overcome with the fumes and smoke inhalation." We have carefully reviewed the original transcript and find nothing therein to support this last finding.[2] There is no evidence in the record as to when, in relation to the start of the fire, the decedents succumbed.

The trial judge found as an ultimate fact that "the fire raged so furiously that it would have been impossible for them [decedents] to have left the house by utilization of any stairway whether or not same was INDEPENDENT in the sense set out in the * * * statute." (Emphasis supplied). This finding appears to be predicated on an unwarranted assumption for which we find no support in the record. However, more important was the failure of the trial judge to give proper consideration to the obviously causal relation between the decedents' inability to escape and the admitted absence of fire escapes.

The court below finally concluded that the "link in the chain of evidence seeking to establish proximate cause between the deaths inflicted and the negligence on the part of the defendants is missing in the instant situation." We find no such weakness in the plaintiffs' proofs. There was

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[2] Four windows of the decedents' apartment faced Hunterdon Street. Each window was only 12 to 13 feet from the opposite wall.

ample evidence in the record from which the court could have, and should have, inferred that the deaths were proximately caused by the violation of the statute. As we view the evidence it will admit of no other inference.

The defendants, relying on rule 52(a) of the Fed. Rules Civ. Proc., 28 U.S.C.A., argue that the trial court's findings of fact may not be set aside unless "clearly erroneous." The rule is not relevant in the instant case. The ultimate findings of fact were predicated upon inferences drawn from evidence as to which there was no disagreement. It has been held by this Court, and others, that under such circumstances findings of fact are reviewable on appeal free of the impact of the rule. *Sears, Roebuck & Co.* v. *Johnson,* 219 F. 2d 590, 591 (3rd Cir. 1955); *Thomas* v. *Commissioner of Internal Revenue,* 254 F. 2d 233, 236 (5th Cir. 1958); *Merchants National Bank & Trust Co.* v. *United States,* 246 F. 2d 410, 417 (7th Cir. 1957); *Orvis* v. *Higgins,* 180 F. 2d 537, 539 (2nd Cir. 1950), cert. den. 340 U. S. 810. Moreover, application of the rule could not avail the defendants. Measured by the standard established by *United States* v. *United States Gypsum Co.,* 333 U. S. 364, 395 (1948), the ultimate findings of fact were clearly erroneous.

The judgment of the court below will be reversed and the action will be remanded with directions that (1) judgment be entered in favor of the plaintiffs, and (2) the Court proceed to a determination of the issues raised by the respective claims for damages.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,024

MAMIE SOLES, Administratrix *ad Prosequendum* for the Estate of Donnie Soles, Deceased, and WILLIE ASKINS, Administrator *ad Prosequendum* for the Estate of Dorothy Askins Soles, Deceased, and Alfreda Askins, Deceased,

Appellants,

vs.

AARON FRANZBLAU and RUTH SCHLEIN

(D.C. Civil No. 414-62)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: McLAUGHLIN, HASTIE and SMITH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court, filed June 25, 1964, be, and the same is hereby re-

versed and the action remanded with directions that (1) judgment be entered in favor of the plaintiffs, and (2) the Court proceed to a determination of the issues raised by the respective claims for damages. Costs to appellants.

ATTEST:

IDA O. CRESSKOFF
Clerk

November 2, 1965

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FILED
FEB 4 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 953

AARON FRANZBLAU and RUTH SCHLEIN,

Petitioners,

vs.

MAMIE SOLES, Administratrix *ad prosequendum* for the estate of DONNIE SOLES, deceased, and WILLIE ASKINS, Administrator *ad prosequendum* for the estates of DOROTHY ASKINS SOLES, deceased, and ALFREDA ASKINS, deceased,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Citations to Opinions Below

The opinion of the District Court is unreported and is printed in Appendix A, page 18a, petition for *certiorari*. The opinion of the Court of Appeals for the Third Circuit is printed in Appendix C, page 3a and is reported in 352 F. 2d 47.

Jurisdiction

As alleged in the petition for *certiorari*, the jurisdiction of this Court is invoked under 28 U. S. C. A. section 1254 (1).

Questions Presented

The petition for *certiorari* states that the decision below presents six questions for review. These questions are incorrectly and improperly presented because they overlook the main fact that the opinion of the Court of Appeals for the Third Circuit, rendered November 2, 1965, specifically concluded that the findings of fact made by the District Court Judge were clearly erroneous. The question as it should be stated is:

> 1. Is not the Court of Appeals empowered to set aside the ultimate findings of fact of the trial court where those findings have been found to be clearly erroneous?

Statutes and Rules Involved

The statement of statutes and rules involved contained in the petition for *certiorari* is complete.

Statement of the Case

This civil action arises from a fire that swept through a Newark tenement in the early morning hours of June 8, 1961. As a result of this fire, three of the four members of a family occupying a rear third floor apartment perished. This action was brought by the administrator *ad prosequendum* of the estate of Donnie Soles and the administrator *ad prosequendum* of the estate of Dorothy Askins Soles and Alfreda Askins.

The building in question was a three-story frame tenement constructed in the 1890's and had one store and an apartment on the first floor and two apartments on the second and third floors, respectively. The sole means of ingress and egress consisted of a front stairway that extended to the third floor and a rear stairway that ran through the enclosed clapboard back porches on each floor up to the third floor. At each floor level there was a common hallway connecting the front and rear stairways. In each apartment there was but one exit that opened onto the common hallway. Therefore, a tenant could only leave his apartment by the one door and by so doing would enter onto the common hallway. There was no fire escape or other avenue of escape other than dropping to the ground from the apartment windows (26a, 35a, 37a to 38a).

A policeman on duty in this precinct on the morning of June 8, 1961, testified that he had passed the building in question approximately five minutes before he received an alarm call that there was a fire. He immediately returned to the scene and found the building ablaze, with people jumping out of the windows. The fire was so intense that it was not possible for him to go in either entrance. When the firemen arrived shortly thereafter, he helped place a ladder against the building halfway between the second and third floors. He stated that he ascended the ladder and was able to break the fall of eight-year-old Alfred Askins, the sole survivor from the Soles apartment, who had been thrown out of a third floor window (28a to 30a). Twenty-five-year-old Donnie Soles was burned to death in his apartment, while twenty-seven-year-old Dorothy Soles and Alfreda Askins, age 7, were subsequently taken out of the burned apartment and died the same day in the hospital.

Plaintiffs' cause of action was predicated *inter alia*, on a violation of the Tenement House Act of New Jersey, in that defendants had failed to provide a fire escape or, in the alternative, two independent stairways not adjacent to each other, as required by N. J. Rev. Stat. 55:3-4. It was plaintiffs' contention that the above statute imposed a standard of conduct, the violation of which constituted actionable negligence.

The case was tried before Judge Coolahan without a jury on February 11 and 13, 1964. At the close of the testimony the court reserved decision and, subsequently, on June 23, 1954, rendered a decision for the defendants and against the plaintiffs. The court found that defendants had violated the above statute and were negligent, but held that there was no evidence to establish a causal relationship between defendants' breach and the deaths. Judgment was entered accordingly. Plaintiffs appealed from the adverse judgment.

Thereafter, on appeal, the Court of Appeals for the Third Circuit reversed for the reasons stated in the opinion. The Court of Appeals found that the finding of the ultimate fact was *clearly erroneous*. (See Appendix C 8a, petitioner's petition for writ of *certiorari*.) There the court stated:

> "Moreover, application of the rule could not avail the defendants. Measured by the standard established by *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948), the ultimate findings of fact were clearly erroneous."

Reasons for Not Granting the Writ

1. The opinion and judgment of the Court of Appeals for the Third Circuit are in complete conformity with Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A.

In reversing the judgment of the District Court for the District of New Jersey, the Court of Appeals held that the ultimate findings of fact were clearly erroneous and therefore Rule 52(a) of the Rules of Civil Procedure did not apply (see Appendix C 8a):

> "Moreover, application of the rule could not avail the defendants. Measured by the standard established by *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948), the ultimate findings of fact were clearly erroneous."

This is a correct interpretation of the scope of 52(a), as set forth by the United States Supreme Court in the case of *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 393 (1948), 68 S. Ct. 525, 541.

2. There is no conflict between any circuit requiring final clarification by the Supreme Court on the right of the Circuit Court of Appeals to set aside a finding of fact under Rule 52(a) when it rules that the findings of fact were clearly erroneous.

Every Circuit Court and the United States Supreme Court, as stated in the conclusion of this Court in *United States* v. *United States Gypsum Co., supra,* has held that where the findings of fact are clearly erroneous the court has a right to set aside the finding of fact.

3. Not only is the opinion and ruling of the Court of Appeals for the Third Circuit in complete conformity with Rule 52(a) but also with the rulings of the United States Supreme Court.

The United States Supreme Court in the case of *United States* v. *United States Gypsum Co., supra,* held in referring to the application of Rule 52(a) on appeal (333 U. S. at p. 394 and 68 S. Ct. at pp. 541-542):

> "That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

It is erroneously stated by the petitioners in their petition at p. 9: "Not only did the Court of Appeals set aside the trial court's findings . . ., but it exceeded its appellate function by entering judgment in favor of plaintiffs." This is a complete misstatement of fact, as appears from Appendix C 8a, wherein the court stated that the matter should be remanded:

> "The judgment of the court below will be reversed and the action will be remanded with directions that (1) judgment be entered in favor of the plaintiffs, and (2) the Court proceed to a determination of

the issues raised by the respective claims for damages."

Nowhere does the petition for review, as filed, present a federal question of substance not heretofore determined by this Court.

Nowhere does the petition present a question that has not been decided in accordance with the applicable decisions of this Court. (See *United States* v. *United States Gypsum Co., supra.*)

Nowhere does the petition present a question wherein the Court of Appeals for the Third Circuit has rendered a decision in conflict with the decision of any other court of appeals. In fact, all the courts of appeal are in complete agreement that the appellate court need not follow the findings of fact when it determines that they are clearly erroneous, as in the instant case.

The Circuit Court of Appeals for the Third Circuit reached its conclusion based upon the sole fact that the findings made by the court below were clearly erroneous, and it was left with the firm conviction that a mistake had been committed.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents.

ALEXANDER AVIDAN,
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Of Counsel with Respondents.